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No. 96-568

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

JOSEPH ONCALE,

Petitioner,

v.

SUNDOWNER OFFSHORE SERVICES, INCORPORATED, JOHN LYONS, DANNY PIPPEN, AND BRANDON JOHNSON,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Are same-gender harassment claims ever cognizable under Title VII?

2. Is male-on-male harassment in an all-male work setting actionable under Title VII simply because there are sexual overtones to the harassment?

CORPORATE LISTING

Sundowner Offshore Services, Inc. ("Sundowner") is a wholly-owned subsidiary of Nabors Industries, Inc. ("Nabors"), a publicly traded corporation. Nabors has no non-wholly-owned subsidiaries that are publicly traded. Sundowner is not publicly traded and has no non-wholly-owned subsidiaries.

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STATEMENT OF THE CASE

A. Statement of Facts.

Joseph Oncale began working for Sundowner in late 1991 as a new roustabout on an eight-man rig crew. Joint Appendix ("App.") 76. Working offshore continuously for seven days at a time followed by seven days off, the Sundowner rig crew lived on one offshore platform and worked on a Chevron platform nearby during the seven-day work week. App. 41. The rig crew included John Lyons, the crane operator, as well as Danny Pippen, a driller, and Brandon Johnson, a floor hand. As crane operator, Lyons supervised Oncale and two other roustabouts, who held the lowest ranking positions on the crew. As driller, Pippen oversaw the work of the derrick hands and the floor hands, including Johnson. Both Lyons and Pippen reported to the tool pusher, who was in charge of the entire crew. Thus, Pippen and Johnson had no supervisory authority over Oncale. App. 41. No women were employed by Sundowner on that rig or on any other rig. *Id.*

From the start of his employment on the Sundowner crew, Oncale allegedly was subjected to verbal abuse by Lyons. App. 76. Lyons also cursed the other two roustabouts. *Id.*

Oncale claims that his fellow rig crew members sexually harassed him in three incidents during late October 1991.[1] In the first incident, on October 25, Oncale claims

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[1] Respondents deny Oncale's allegations of harassment. However, because the district court granted summary judgment

that, while he and the other seven crew members were traveling by boat to the Chevron platform, Lyons, in plain view of the other crew members, placed his penis on the back of Oncale's head, saying that he was going to "fuck [Oncale] in [his] behind." App. 76. Pippen allegedly participated with Lyons by restraining Oncale during this incident. *Id.*

Oncale also claims that, during the day on October 26, when Oncale and the other crew members were being transported in a crane personnel basket from a boat to the Chevron platform, Lyons placed his penis on Oncale's arm. *Id.* Johnson allegedly grabbed and held Oncale during this incident. *Id.*

On the evening of October 26, a third incident allegedly occurred, which, like the prior two incidents, took place in the presence of the entire crew. Oncale was in the shower, within sight of the rest of the crew in the immediately adjacent bunk room. App. 69. Lyons and Pippen entered from the bunk room and jumped into the shower with Oncale. App. 68. With Pippen grabbing and holding Oncale, Lyons told Oncale "yeah, we know you talked to daddy [*i.e.*, the toolpusher who was Lyons' supervisor] about it but we're going to fuck you anyway." App. 67-68, 73, 76. Lyons rubbed a bar of soap between Oncale's buttocks. App. 67-68. Oncale then freed himself and threw Lyons out of the shower. App. 67. Lyons or Pippen commented to Oncale, "[w]hat's wrong, you don't want us taking a shower with us [sic]?" App. 77.

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against Oncale, Respondents treat Oncale's well-pleaded allegations as true.

After the shower incident, Lyons did not have any physical contact with Oncale. Sometime during Oncale's last week of duty, Lyons said to him, "You told your daddy [*i.e.*, the toolpusher], huh? Well it ain't going to do you no good because I'm going to fuck you anyway." App. 72-73.

Other Sundowner rig employees allegedly suffered similar treatment. On November 7 or 8, Oncale was present when a new galleyhand complained to the Chevron company representative in charge of the Chevron platform about Pippen kissing that galleyhand and Lyons telling that galleyhand that Lyons "loved him" and wanted to "fuck him in his butt." App. 80. During a safety meeting the next morning, the Chevron company representative told Lyons and Pippen "not to mess with the galleyhand anymore," explaining that the galleyhand was "new," and "green to the field" and that the galleyhand "didn't know how it was offshore." *Id.*

In another such instance, crewmembers restrained a co-worker named Brumfield so that Lyons could give him a hickey on his neck. App. 86-88, 95-96. Pippen admitted occasionally "goosing" Oncale by grabbing him on his buttocks, and Lyons touched other workers on the buttocks and in the genital area. App. 93, 95.

Oncale resigned on November 10, 1991, after being reprimanded by Lyons for taking a smoking break without Lyons' permission. Lyons used vulgar language in reprimanding Oncale, calling Oncale "an s.o.b." and a "smartass." App. 77-79. Oncale retorted that Lyons was a "smartass." App. 79. After Lyons told Oncale that he was going to "run him off," Oncale told Lyons that he quit. *Id.*

B. Course of Proceedings and Disposition Below.

Oncale brought an action solely under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), unaccompanied by any state tort law claims, against Sundowner, Lyons, Pippen, and Johnson. App. 18. In granting summary judgment, the district court relied on Fifth Circuit precedent holding "that '[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination.' " *Garcia v. Elf Atochem North Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994), *quoting Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993). App. 106.[2]

The Fifth Circuit affirmed, interpreting that court's prior decision in *Garcia v. Elf Atochem North America* to hold that "same-sex harassment claims are not viable under Title VII." App. 112. In thus following *Garcia*, the Fifth Circuit recognized that *Garcia's* holding was itself based on the earlier Fifth Circuit decision in *Giddens v. Shell Oil Co.* in which that court had held that "male-on-

[2] As an alternate basis for summary judgment on Oncale's claims against Pippen and Johnson, the district court held that neither had supervisory control over Oncale and thus neither was Oncale's employer for purposes of Title VII. App. 106-07 & n.4. Pippen's job as driller gave him supervisory authority only over derrick hands and floor hands, such as Johnson, but not over roustabouts like Oncale. App. 41. Given the lack of any evidence in the record raising a fact issue on the point, Oncale erroneously continues to assert in his Petitioner's brief on the merits that Pippen had *de facto* control over him. *See* Petitioner's Brief ("Pet. Br.") at 4.

male harassment with sexual overtones is not sex discrimination without a showing that an employer treated the plaintiff differently because of his sex." App. 111-12.

The Fifth Circuit denied rehearing en banc from the panel's affirmance of the summary judgment against Oncale on his Title VII claim. App. 116. The Court granted Oncale's petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

Title VII, as written, provides a remedy to individuals who have been discriminated against because of their "sex" with regard to "compensation, terms, conditions, or privileges of employment." Title VII provides this remedy to redress the historical subordination of women in the workplace and to further the goal of equal employment opportunity for both women and men. To accomplish the statutory purpose, the Court has found sexual harassment to be prohibited where "discrimination based on sex has created a hostile or abusive work environment."

Oncale would have the Court expand "sexual harassment" to comprehend same-gender harassment with sexual overtones where there is no showing of discrimination based on gender. This would expand Title VII beyond its language and legislative purpose by conflating sex discrimination with sexual orientation discrimination. All courts that have openly addressed the application of Title VII to sexual orientation have properly left this politically charged controversy to the political process.

An expansion of Title VII to cover same-gender sexual harassment claims would intrude deeply into the customary province of state tort law by creating a generalized prohibition of workplace misconduct in the absence of congressional findings anchoring the new cause of action in constitutional authority. Congress has not spoken, either expressly or even tacitly, on the issue of same-sex abusive behavior in the workplace. Nothing on the face of Title VII or in the legislative history would bring same-gender sexual harassment within the sweep of the statute. The Fifth Circuit has therefore correctly declined to expand Title VII beyond its language and statutory purpose and into an area where Congress has refused to go.

The great majority of courts and the EEOC have construed Title VII to require proof that the sexual harassment complained of occurred *because of gender*. No proof exists here that the alleged harm occurred because of the employee's gender. Oncale was not victimized or harassed because he is a man as opposed to being a woman. To apply Title VII to the complained-of conduct based solely on its sexual content would distort the judicial interpretation of certain sexual harassment as sex discrimination into a stand-alone sex harassment cause of action for unwelcome sexuality in the workplace.

The Fifth Circuit refused to engage in such an unwarranted expansion of Title VII. The court correctly rejects same-gender sexual harassment claims where, as in this case of all-male hazing in an all-male environment, no evidence exists of a difference in treatment because of gender.

By contrast, those courts recognizing same-gender sexual harassment claims have impermissibly expanded Title VII beyond its language and its legislative purpose. Same-gender sexual harassment claims invariably devolve into allegations of conduct that conflates gender with sexual orientation and/or conduct that, while perhaps sexually charged, does not constitute discrimination because of gender. By allowing such conduct to be actionable under Title VII, those courts unmoor the statute from its language and purpose.

ARGUMENT AND AUTHORITIES

I. TITLE VII DOES NOT REDRESS SAME-GENDER SEXUAL HARASSMENT.

In enacting Title VII, Congress has spoken specifically on the issue of workplace discrimination that enforces or perpetuates the subordination of women to men. What Congress has not done is to create through Title VII a generalized federal regulation of offensive or reprehensible workplace conduct, even if it has sexual overtones. At issue before the Court is an attempt to transform a limited federal statute prohibiting specific discriminatory conduct into a comprehensive all-purpose law of the workplace. This is a step that Congress could not take, consistent with deep principles of federalism, absent extraordinary findings. It is certainly not a step that courts may take in the absence of any statutory authorization.

A. The Language and Purpose of Title VII Does Not Encompass Same-Gender Sexual Harassment.

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[3] 42 U.S.C. § 2000e-2(a)(1). The purpose of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). Although the legislative history is sketchy, see *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-64 (1986), the brief House debate reflects that Congress included the prohibition against sex discrimination in Title VII in order to prevent discrimination against women and "to protect the employment rights of all women." 110 Cong. Rec. 2577 (1964).

As the Court acknowledged in *Khan v. Shevin*, 416 U.S. 351 (1974), the provisions in Title VII relating to sex

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[3] The Court has indicated that Title VII uses the word "sex" in the sense of "gender." *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-41 (1989) (using the terms "gender" and "sex" interchangeably); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (Title VII covers discrimination "because of . . . gender"). Title VII's ban against gender discrimination prohibits "discriminat[ion] against women because they are women and against men because they are men," *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985). *Accord J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting).

discrimination were needed to provide redress for inequities faced by women in the workforce. *Id.* at 353. Thus, the Court stated "[w]hether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs." *Id.* Title VII provides a mechanism for eradicating the subordinate treatment of women in the workplace in order to achieve the goal of equal employment opportunity.

Other laws passed by Congress near the enactment of Title VII shed light on Title VII's ban against sex discrimination. Just one year before passage of Title VII, Congress passed the Equal Pay Act of 1963 based on congressional findings reflecting Congress' desire to eliminate the subordination of women in the workforce. *See* 29 U.S.C. § 206 note. Thus, legislative hearings that had been conducted in connection with the Equal Pay Act informed Congress in its inclusion of the prohibition on sex discrimination in Title VII. Furthermore, since the 1964 passage of Title VII, Congress has, by its amendments to Title VII and its enactment of related antidiscrimination laws, consistently reiterated that the purpose of Title VII is to eradicate the subordinate treatment of women in the workplace, thereby fostering the principle of equal employment opportunity.[4]

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[4] In 1978, the Pregnancy Discrimination Act was introduced "to ensure that working women are protected against all forms of employment discrimination based on sex" and in recognition of the fact that Title VII's goal is to provide equal employment opportunities for women. H. R. Rep. No. 95-948 at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4750, 4755. Similarly, Congress passed the Civil Rights Act of 1991, now

The paradigm of sex discrimination prohibited by Title VII is a woman who was not hired, not promoted, demoted, or discharged because she is female. The Court has made clear that an individual claiming that an employer intentionally discriminated against her because of her gender bears the burden of proving whether that discrimination occurred. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973); *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981) (refining *McDonnell Douglas* test to clarify that burden of persuasion remains at all times on the plaintiff); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) (clarifying that to survive summary judgment, plaintiff must raise fact issue that employer's proffered legitimate nondiscriminatory reason for decision is false *and* that discrimination is the real reason).

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986), the Court recognized a claim of male-on-female sexual harassment as actionable sex discrimination under Title VII. *Meritor* looked to *Rogers v. EEOC*, 454 F.2d 234

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codified as 42 U.S.C. § 1981a, in order to extend "monetary remedies for intentional discrimination to cover women and religious minorities." H. R. Rep. 102-40(I), at 14-15 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 553; *see also id.* at 65, 1991 U.S.C.C.A.N. at 603 (suggesting that "[g]ender and religious discrimination" should be treated like "racial discrimination" for "purposes of the remedial scheme provided by federal law for intentional discrimination"). Also in 1991, the Glass Ceiling Commission was created to address under-representation of women and minorities in executive, management, and senior decisionmaking positions in business and to eliminate "artificial barriers to the advancement of women and minorities in employment." *Id.* at 19-20, 1991 U.S.C.C.A.N. at 557-58.

(5th Cir. 1971), in which the en banc Fifth Circuit held that Title VII "sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." *Id.* at 238. The Court, in *Meritor*, concluded that "[n]othing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited." 477 U.S. at 66.

The Court reiterated in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), that discriminatory intent is an indispensable element of a Title VII sexual harassment claim:

> "The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment," which includes requiring people to work in a discriminatorily hostile or abusive environment. When the workplace is permeated with "discriminatory intimidation, ridicule, and insult," . . . that is "sufficiently severe or pervasive . . . ," Title VII is violated.

510 U.S. at 21, 22 (citations omitted) (quoting *Meritor*, 477 U.S. at 65); *see also id.* at 25 (Scalia, J., concurring) ("Accepting *Meritor's* interpretation of the term 'conditions of employment' as the law, the test is not whether work has been impaired, but whether working conditions have been discriminatorily altered."); *id.* at 25 (Ginsburg, J., concurring) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed").

Prohibiting opposite-gender sexual harassment is a necessary extension of the principle of equal employment opportunity. *See DeAngelis v. El Paso Municipal Police Officers Ass'n*, 51 F.3d 591 (5th Cir. 1993) (the purpose of allowing women to bring sexual harassment claims "is to level the playing field for women who work by preventing others from impairing their ability to compete on an equal basis with men"), *cert. denied*, 116 S. Ct. 473 (1995). The judicial recognition of male-on-female sexual harassment developed as a logical outgrowth of Title VII, given the statutory purpose of remedying the subordination of women. *See* CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 235 (1979) ("each incident [of sexual harassment] reproduces . . . the inequitable social structure of male supremacy and female subordination which Title VII . . . seek[s] to eliminate").

Both the remedial purpose and the equal employment opportunity principle animating Title VII likewise require recognition of female-on-male harassment. *See id.* at 202. The gender-neutral language of Title VII and the Court's opinion in *Meritor* are consistent with this understanding. *See* 477 U.S. at 67 ("Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."). Thus, "[i]t is being the victim of anti-male or anti-female bias that forms the basis of a Title VII sexual harassment claim, not simply being exposed to 'sexual'-type comments or behavior." *Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805, 808 (N.D. Ind. 1995).

While Title VII supports a cause of action for discriminatory decisionmaking in employment regardless

whether the decisionmaker is the same gender as the claimant, that fact does not support the conclusion that same-gender sexual harassment is discrimination because of gender. In contrast to sexual harassment claims, the focus in disparate treatment claims challenging employment decisions is on the circumstances relating to the decisionmaking process because the decision itself is at issue. *See Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730, 739 & n.13 (N.D. Ill. 1996). The standards of proof and legal inferences that apply to discriminatory harassment claims differ from those used in typical disparate treatment cases. *Compare Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982), *with Burdine*, 450 U.S. at 252-56.

Furthermore, in contrast to employer liability for discriminatory decisionmaking, an employer is not automatically liable for sexual harassment. *See Meritor*, 477 U.S. at 72 (agency principles provide guidance in determining employer liability); *Jansen v. Packaging Corp. of Am.*, Nos. 95-3128, 96-1361, 1997 WL 459001 (7th Cir. Aug. 12, 1997) (en banc) (per curiam) (seven different opinions on what standard of liability applies to claims of sexual harassment); *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993) ("An employer becomes liable for sexual harassment only if it knew or should have known of the harassment and failed to take prompt remedial action."). This agency inquiry is obviated in discrimination claims based on decisionmaking in employment because the employer by definition ratifies its own employment decisions.

In seeking to benefit from the Court's observation in *Castaneda v. Partida*, 430 U.S. 482 (1977), that members of a class can discriminate against others in their own class,

id. at 499, Oncale and amici disregard *Castaneda's* holding that recovery under Title VII requires proof of disparate treatment because of gender. In intraclass discrimination cases calling for application of the *McDonnell Douglas* formula, plaintiffs still must show some difference in treatment from others in order to state a prima facie case. *See, e.g., Castaneda*, 430 U.S. at 486-87; *McDonnell Douglas*, 411 U.S. at 802; *Veatch v. Northwestern Mem'l Hosp.*, 730 F. Supp. 809, 820 (N.D. Ill. 1990). Consequently, Oncale and amici misplace their reliance upon this line of cases to support the actionability of same-gender sexual harassment under Title VII.

Because same-gender harassment is unrelated to the types of inequalities and discriminations that Title VII aims to eradicate, any literal compliance with the statutory language requiring discrimination because of gender transforms the statute. As Judge Niemeyer of the Fourth Circuit has observed:

> Detached from their historical setting, the terms of Title VII's prohibition of discrimination, "because of" an individual's "sex" stand only as "inert language, lifeless words," and, perhaps even "playthings" with which to reconstruct the Act.

Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 749 (4th Cir. 1996) (Niemeyer, J., concurring), *cert. denied*, 117 S. Ct. 70 (1996).

Courts that have allowed same-gender sexual harassment claims to survive summary judgment inevitably fail to adhere to the meaning of the statutory language they purport to satisfy. Whenever courts look to the homosexual orientation of the same-gender harasser to find proof

of discrimination, they drift away from the language and purpose of the statute. *See Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997) (equating "because of sexual attraction" with "because of sex"); *see also* EEOC COMPLIANCE MANUAL (CCH) § 615.2(b)(3) (also collapsing sexual attraction into discrimination because of sex).[5]

Likewise, courts allowing claims based on same-gender sexual harassment such as hazing, horseplay, and sexually-charged same-gender rituals (such as the men being grabbed or poked in the testicles by other men, or "bagging," found in *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1379 (8th Cir. 1996)), even if occurring in a dual-gender working environment, misunderstand such conduct as discrimination because of gender within the meaning, purpose, and intent of Title VII. *See Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (rejecting claim of male-on-male sexual harassment despite evidence employee reacted differently to female employees' harassment complaints, noting that even if plaintiff was (in that sense) harassed "because" he was a male, that harassment was not because of gender "consistent with the underlying concerns of Congress" in enacting Title VII); *see also Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730, 737-40 (N.D. Ill. 1996). In short, when people of the same gender sexually harass each other, their conduct never amounts to discrimination because of gender as required by Title VII.

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[5] This same inquiry has been applied to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, see 62 Fed. Reg. 12,034, 12,039 & n.13 (1997) (final policy guidance).

B. Title VII Is Not a Generalized Workplace Tort Statute.

To hold that cases involving same-gender sexually harassing conduct are actionable under Title VII as discrimination because of gender simply because of the sexual content of the conduct would write the "because of sex" language out of the statute. Title VII should not be artificially forced to address issues unrelated to its purpose. *See, e.g., McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir. 1996) (Title VII was not intended to provide "unmanageably broad protection of the sensibilities of workers simply 'in matters of sex.' "), *cert. denied*, 117 S. Ct. 72 (1996); *Hughes v. Derwinski*, 967 F.2d 1168, 1173 (7th Cir. 1992) ("Title VII is not a general bad acts statute; it only addresses discrimination.").

Congress might wish to legislate protection for all individuals from workplace harassment, but it did not do so in enacting Title VII. *See Schoiber*, 941 F. Supp. at 740. The language of Title VII would plainly have been drafted differently had Congress meant to provide such redress.[6] For example, the Minnesota Human Rights Act was recently amended to define sexual harassment as

[6] Congress has not hesitated to amend Title VII when it has disagreed with judicial interpretation, or when courts have faced concerns not contemplated by the drafters of the statute. *See* H.R. Rep. 95-948 2-3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4750-51 (Pregnancy Discrimination Act legislatively overruled *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976)); H. R. Rep. No. 102-40(1), at 2-3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 550-51 (Civil Rights Act of 1991 overturned five Supreme Court cases and added damages provision expressly to provide adequate remedies for victims of sexual harassment).

"includ[ing] a variety of specific behaviors" under the umbrella of sex discrimination. MINN. STAT. § 363.01, subds. 41, 14 (1996). The Minnesota Supreme Court interpreted this legislatively expanded definition of sexual harassment to render superfluous the requirement of proof of discrimination "because of sex" that applied to other sex discrimination claims. *Cummings v. Koehnen*, 568 N.W.2d 418, 1997 WL 528158, at *3 (Minn. Aug. 28, 1997).[7]

The issue of same-gender sexual harassment does not emerge from the interstices of Title VII. Because same-gender sexual harassment does not involve a difference between the sexes or otherwise implicate Title VII's remedial goal of providing equal employment opportunity for women and men, it is an entirely separate area of concern that cannot and should not be grafted onto Title VII. *See generally* Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII*, 7 YALE J. L. &

[7] Commentators also have proposed statutory language that would achieve the result Oncale struggles for under Title VII in this case. *See* Deborah N. McFarland, *Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation*, 65 FORDHAM L. REV. 493, 536-39 (1996) (suggesting federal legislation prohibiting sexually harassing conduct in the workplace without any requirement to show it occurred because of sex); Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 9 YALE L. & POL'Y REV. 333, 362-63 (1990) (proposing a tort of sexual harassment modeled after the tort of intentional infliction of emotional distress); Michelle Ridgeway Peirce, Note, *Sexual Harassment and Title VII – A Better Solution*, 30 B.C. L. REV. 1071 (1989) (suggesting that new legislation that would remove inappropriate sexual conduct from the workplace by prohibiting sexual harassment based on one's sexuality, leaving Title VII to address sexual harassment based on one's gender).

FEMINISM 375, 382 (1995) (disparities of power between men and women are not perpetuated when all the actors are the same sex); CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 204 (1979) (recognizing the doctrinal problem with gay harassment).

C. Title VII Lacks Legislative Authority for Redressing Same-Gender Sexual Harassment, Particularly in Light of Congress' Refusal to Redress Sexual Orientation Discrimination.

To inject same-gender sexual harassing conduct issues into Title VII would disregard the limits Congress drew on its own exercise of authority in enacting the statute. In invoking the Commerce Clause and the Fourteenth Amendment as constitutional authority for exerting control over the workplace to remedy discrimination, Congress made no findings suggesting that the broad sweep of this law should redress same-gender sexually harassing conduct. Without statutory language, legislative intent or congressional findings articulating a basis in constitutional authority for addressing this area, an extension of Title VII to cover same-gender sexual harassment would undermine the statute's vitality as a valid exercise of congressional authority.

Congress must make appropriate findings to justify supplementing the normal functioning of state law as the primary regulation of individuals within the state. *See United States v. Lopez*, 514 U.S. 549 (1995) (imposing some threshold proof of need for impact on interstate commerce); *see also City of Boerne v. Flores*, 117 S. Ct. 2157, 2169 (1997) (distinguishing expansive congressional regulation

under the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.*, from that under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb, on the basis of clear congressional findings of threats to protected rights under former but not the latter).

Congress historically has drafted explicit legislation to protect individuals from discrimination based on classifications in addition to those specified in Title VII. When Congress sought to provide redress for employment discrimination based on age and disability, it enacted separate legislation with appropriate findings to support the exercise of congressional authority over these other areas of concern. *See* Age Discrimination in Employment Act, 29 U.S.C. § 621; Americans With Disabilities Act, 42 U.S.C. § 12101. Under either the Commerce Clause or the Fourteenth Amendment, Congress, in regulating a new area of concern, must at least make the threshold and factually supported determination that the national interest is implicated in that area. Absent that determination, federalism dictates that these matters be left to state law to regulate. *See generally Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.").

According to the Court's decision in *City of Boerne*, the Voting Rights Act survived and RFRA did not because of the extent of the congressional inquiry into the magnitude of the potential harm that in turn justified federal

action. Under the Voting Rights Act, the Court found "congruence and proportionality between the [unconstitutional] injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 117 S. Ct. at 2164. In contrast, the legislative record in RFRA lacked any showing of a current danger of the harm that RFRA meant to address. *Id.* at 2169.

Because Title VII derives its authority in part from the Fourteenth Amendment, the statute must be anchored in some explanation of the constitutional concern it addresses and the remedial nature of the legislation in this area. Same-gender sexually harassing conduct does not fit into any category that has previously been recognized by Congress as an area of constitutional concern. Put simply, same-gender sexual harassment is not the unconstitutional behavior that Title VII was designed to prevent. *See id.* at 2170.

The lack of congressional findings addressing same-gender sexual harassment in Title VII is not an inadvertent omission. Just as opposite-gender sexual harassment is understood as a subset of discrimination because of gender, see *Schoiber*, 941 F. Supp. at 739 & n.13, same-gender sexual harassment, or much of it, is best understood as a subset of discrimination because of sexual orientation. In addition to cases of explicit same-gender sexual harassment because of sexual orientation, see *Dillon v. Frank*, No.90-2290, 1992 WL 5436, at *4-5, (6th Cir. Jan. 15, 1992), as discussed in Section IIB of this brief, all cases involving homosexual harassers and gender-stereotyping involve a conflation of gender and sexual orientation that inherently and primarily implicates the latter.

Creation of a workplace hostile to a gender is not equivalent to creating a workplace hostile to sexual orientation. Furthermore, creation of such a *federal* cause of action would require specific congressional findings and legislation.

The failure of Congress to legislate in this area is not a matter of oversight. Congress has repeatedly refused to legislate a remedy for sexual orientation discrimination. *See Romer v. Evans*, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting) (observing that Congress "has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws"); *Ulane*, 742 F.2d at 1085 n.11 (citing bills presented in 1974, 1975, 1977, 1980 and 1982); Employment Non-Discrimination Act (ENDA) of 1994, S. 2238, 103d Cong. (1994); ENDA, S. 2056, 104th Cong. (1996) (rejected by 49-50 Senate vote, *see* 142 CONG. REC. S10129-39 (daily ed. Sept. 10, 1996)).[8] Thus, a decision to discharge an employee made because

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[8] Proponents of legislation to extend Title VII's protection to prohibit discrimination based on sexual orientation have admitted the lack of federal statutory protection for gays and lesbians. *See, e.g.*, 142 CONG. REC. S10057 (daily ed. Sept. 9, 1996) (remarks of Senator Edward Kennedy in support of ENDA) ("Although we know that the problem exists, there are no rules, regulations, or laws to protect people."). The courts of appeals agree that "because of gender" in Title VII does not mean "because of sexual orientation." *See Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) (collecting cases); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal.1975), *aff'd*, 570 F.2d 354 (9th Cir. 1978).

of the decisionmaker's anti-homosexual animus is outside the statutory ambit of Title VII – no matter how repugnant to meritocratic ideals such an employment decision is.

If Congress were to amend Title VII to include a prohibition on discrimination because of sexual orientation, same-gender sexual harassment would be included as a type of discrimination in the same way that opposite-gender sexual harassment is included under Title VII as a type of gender discrimination. The most recent version of ENDA proposes the very invocation of congressional power over this area that is presently conspicuously absent from Title VII. *See* 143 CONG. REC. S5458 (daily ed. June 10, 1997) (one of the purposes of bill seeking enactment of ENDA is "to invoke congressional powers, including the powers to enforce the 14th amendment to the Constitution and to regulate commerce, in order to prohibit employment discrimination on the basis of sexual orientation."). Lacking grounding in Title VII's language, its purpose, or the equal employment opportunity principle that informs the statute, same-gender sexually harassing conduct should remain a subject of state tort law and not be converted into an issue of federal concern. Any other result would torture the meaning of Title VII's prohibition of sex discrimination and set the statute adrift from its moorings.

II. THE FIFTH CIRCUIT CORRECTLY HELD THAT MALE-ON-MALE HARASSMENT IN AN ALL-MALE WORK SETTING IS NOT ACTIONABLE UNDER TITLE VII SIMPLY BECAUSE THERE ARE SEXUAL OVERTONES TO THE HARASSMENT.

The Court in *Meritor* tethered sexual harassment as a cause of action for gender discrimination to Title VII by recognizing that harassment because of gender could alter the terms and conditions of employment in a way that Title VII prohibits. This case illustrates that the sexual content alone of sexually harassing conduct is not enough to maintain this critical connection to the statute. And, because all same-gender sexual harassment has only sexual content, and nothing to suggest discrimination because of gender, no such harassment is prohibited by Title VII.

A. The Sexual Content Alone of Sexual Harassment is Not Enough to Raise a Fact Issue of Discrimination Because of Gender.

The Court in *Meritor* held that, "when a supervisor *sexually* harasses a subordinate *because of the subordinate's sex*, that supervisor 'discriminate[s]' on the basis of sex [under Title VII]." 477 U.S. at 64 (emphasis added.) The phrase "because of the subordinate's sex" in this statement from the *Meritor* opinion would have been redundant had the Court concluded that sexual harassment is always discrimination because of gender. *Accord Barnes v. Costle*, 561 F.2d 983, 989 n.49 (D.C. Cir. 1977) (holding, in the first decision by a circuit court recognizing Title VII

claim for sexual harassment, that "[t]he vitiating sex factor thus stemmed not from the fact that what appellant's superior demanded was sexual activity – which of itself is immaterial – but from the fact that he imposed upon her tenure in her position a condition which ostensibly he would not have fastened upon a male employee") (emphasis added); EEOC COMPLIANCE MANUAL (CCH) § 615.3(a) ("Sexual harassment is sex discrimination not because of the sexual nature of the conduct to which the victim is subjected but because the harasser treats a member or members of one sex differently from members of the opposite sex."). Thus, in recognizing opposite-gender sexual harassment as actionable under Title VII, the Court did not create a stand-alone cause of action for unwelcome sexuality in the workplace.

Meritor's endorsement of the holding in *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), that "under certain circumstances the creation of an offensive or hostile work environment due to sexual harassment can violate Title VII," *id.* at 901, likewise indicates that proof of discrimination "because of gender" is an essential element of a Title VII sexual harassment claim. *See Meritor*, 477 U.S. at 66-67 (quoting *Henson*, 682 F.2d at 902). The *Henson* court observed that not "every instance of sexual harassment gives rise to a Title VII claim against an employer for a hostile work environment," 682 F.2d at 903, and went on to outline the elements that a plaintiff must show to establish her claim, including proof that the employee was subject to unwelcome sexual harassment, and that the harassment complained of was based upon sex. *See id.* at 903-904.

Like the Eleventh Circuit in *Henson*, almost all the circuits include the dual requirements of (1) unwelcome conduct of a sexual nature, and (2) harassment based upon sex, as elements of a hostile environment sexual harassment claim under Title VII. *See Brown v. Hot, Sexy and Safer Prods.*, 68 F.3d 525, 540 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1044 (1996); *Swentek v. USAIR*, 830 F.2d 552, 557 (4th Cir. 1987); *Jones v. Flagship Int'l*, 793 F.2d 714, 719 (5th Cir. 1986); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 619 (6th Cir. 1986); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013 (8th Cir. 1988); *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 797 (10th Cir. 1997), *petition for cert. filed*, No. 97-5642 (U.S. Aug. 11, 1997); *Highlander v. K.F.C. Nat'l Mgmt. Co.*, 805 F.2d 644, 649 (6th Cir. 1986); *see also King v. Hillen*, 21 F.3d 1572, 1580 (Fed. Cir. 1994) ("Sexual harassment will lie if the offensive conduct is based on the employee's sex, is unwelcome, and is sufficiently severe."); *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (any harassment, whether with clearly sexual overtones or not, "that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII").[9]

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[9] The Ninth Circuit, cited by Amici Lambda Legal Defense Fund, et al., is the only circuit that does not explicitly include "because of sex" as an element in hostile work environment sexual harassment cases, see, *e.g.*, *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995). Significantly, that court has not yet issued an opinion applying its elements to a same-gender sexual harassment claim.

1. No courts allow an automatic inference of discrimination because of gender in same-gender sexual harassment cases.

Many courts when faced with an opposite-gender harassment claim under Title VII infer that the sexually harassing conduct occurred "because of gender."[10] Given that the context of the opposite-gender exchange implicates the purpose of the statute, this makes sense. Typical of this approach is that taken by the Third Circuit, which requires that employees establish, as an element of a Title VII hostile environment sexual harassment claim, that "the employees suffered intentional discrimination because of their sex," *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 860 (3d Cir. 1990), but has also suggested in an opposite-gender case that "[t]he intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990).[11] As one court has explained:

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[10] The Eleventh Circuit in *Henson* noted that the inference should not always be drawn in opposite-gender cases. For instance, in "cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers," "the sexual harassment would not be based upon sex because men and women are accorded like treatment," and no Title VII remedy would be available. 682 F.2d at 904.

[11] It should be noted that the Third Circuit, like the Ninth Circuit, has yet to decide a case asserting same-gender sexual harassment under Title VII.

> The distinction [between "sex" and "sexual" purposes of satisfying Title VII's requirement "because of gender" of discrimination] makes little difference when dealing with male-on-female or female-on-male sexual harassment; at least, it has typically been treated as one and the same. When a man touches a woman in a sexual manner, or asks her to have sexual relations with him, it can be presumed that he is doing so because she is a woman. Her gender is probably not incidental. It is only with same-sex harassment that the distinction becomes very important.

Vandeventer v. Wabash Nat'l Corp., 887 F. Supp. 1178, 1181 (N.D. Ind. 1995).

Virtually all courts that have addressed same-gender sexual harassment claims have refused to draw an automatic inference of discrimination because of gender when faced with a Title VII claim involving same-gender sexually harassing conduct. In *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), the Seventh Circuit was forced to recognize that:

> this ["because of gender"] requirement has not detained courts long in cases of opposite-sex harassment; it is generally taken as a given that when a female employee is harassed in explicitly sexual ways by a male co-worker or workers, she has been discriminated against "because of" her sex. But courts by and large have been unwilling to make the same assumption when a man harasses another man in the workplace, however rife the harassment may be with sexual innuendo, sexual contact, and other conduct of an explicitly sexual nature. They have looked instead for proof, above and

> beyond the sexual content of the harassment itself, that the plaintiff was singled out for harassment because of his gender.

Id. at 574-75 (citations omitted); *see* Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 723 (1997) [hereinafter *What's Wrong*] ("Unlike the different-sex cases, in same-sex cases brought under Title VII most courts demand that the plaintiff show something more than that the conduct was unwelcome and of a sexual nature.").[12] That courts decline to draw an inference in these cases is consistent with the failure of same-gender harassment to implicate the purpose of Title VII.

2. Only the Seventh Circuit has gone so far as to suggest that sexual content alone raises an inference of discrimination because of gender – and the Seventh Circuit later retreated.

The Seventh Circuit is the only court that has addressed directly the question whether the sexual content of same-gender harassment can raise a fact issue

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[12] Compare *Katz v. Dole*, 709 F.2d 1251, 1255 (4th Cir. 1983) (in opposite-gender sexual harassment case, sexual nature alone of harassing conduct almost always will represent an "intentional assault") *with McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1995) (same circuit holding in same-gender sexual harassment case that claim was not actionable because both claimant and the harasser were heterosexuals and holding "result [was] compelled by a common sense reading of the critical causation language of the statute: *'because of the [claimant's] sex.'* ").

under Title VII. In *Doe*, the panel majority, having recognized that the presumption of gender-based discrimination drawn in opposite-gender cases is not imported to same-gender sexual harassment by other courts, went on to question why the sexual content of the conduct should not be enough:

> It is not clear why such proof [that the plaintiff was targeted for harassment because of his gender] is needed when the harassment has explicit sexual overtones, however. Arguably, the content of that harassment in and of itself demonstrates the nexus to the plaintiff's gender that Title VII requires. . . . This view is consistent with the EEOC's guideline, which does not focus on whether the harasser singled out the victim on the basis of her gender, but instead provides simply that "verbal or physical conduct of a sexual nature constitute[s] sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."

119 F.3d at 574-75 (quoting 29 C.F.R. § 1604.11). In a bold conclusion, the majority attempted to avoid applying the statute as written by Congress and interpreted by the Court, stating: "We view with considerable skepticism, therefore, the notion that same-sex harassment that is overtly sexual and sex-based is only sex discrimination when the plaintiff can produce proof that the harasser chose him specifically *because he is male.*" *Id.* at 580 (emphasis added). Thus, where *Meritor* expressly grounded the sexual harassment cause of action in Title VII's fundamental purpose as a protection against gender

discrimination, *Doe* severed the required connection by recognizing same-gender sexual harassment based solely on the sexual content of the harassing conduct and thereby reducing Title VII to a per se rule prohibiting all sexual conduct in the workplace.

The *Doe* majority ultimately did not rest its holding entirely on its per se rule. Rather, in holding that the plaintiffs raised a fact issue under Title VII, it also relied on evidence of gender-stereotyping comments that clearly imply sexual orientation discrimination. *See Doe*, 119 F.3d at 568 (reversing summary judgment that district court based on *Ulane*'s holding that Title VII does not afford protection from sexual orientation discrimination).

Just one month and a day after *Doe*, in *Johnson v. Hondo*, No. 96-3492, 1997 WL 541952 (7th Cir. Aug. 28, 1997), the Seventh Circuit decided the claims of another plaintiff seeking redress under Title VII for same-gender-sexually-charged conduct. The *Hondo* panel affirmed the district court's summary judgment in favor of the employer on the plaintiff's Title VII sexual harassment claim. Acknowledging that this holding "may appear at first blush to be in some tension with the analysis in *Doe*," *id.* at *4, the panel distinguished *Doe*, but not on the basis that the conduct complained of by the plaintiff in *Hondo* somehow differed in sexual content. *Hondo*'s holding indicates that the Seventh Circuit has conceded that sexual content alone is not enough to raise an inference that same-gender harassing conduct occurred "because of

gender."[13] Furthermore, although the *Hondo* panel attempted to distinguish the facts in *Doe* on the basis of so-called gender-stereotyping harassment in that case, the only principled way to reconcile the two cases is on the grounds that the *Hondo* panel realized that the *Doe*

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[13] Tacitly recognizing that only the sexual nature of the conduct at issue here could raise a fact issue of gender discrimination, Oncale and amici broadly embrace *Doe's* suggestion that the sexual content alone of same-gender harassing conduct is enough to raise a fact issue on this element to survive summary judgment. *See* Pet. Br. at 23; Brief of Law Professors as Amici Curiae in Support of Petitioner ("Law Prof. Br.") at 18 (criticizing the Fifth Circuit for "demand[ing] . . . that the sexual harassment plaintiff show that he or she was treated 'differently because of his [or her] sex'"); Brief of Lambda Legal Defense and Education Fund, et al., as Amici Curiae in Support of Petitioner ("Lambda Br.") at 5-8 (arguing that victims of sexual harassment experience the sexual content of the conduct in different ways depending on whether they are a man or woman), Brief Amicus Curiae of the National Employment Lawyers Association in Support of Petitioner ("NELA Br.") at 19-20. Amici The National Organization on Male Sexual Victimization, Inc., et al. argue that male-on-male sexually harassing conduct relates to male aggression and dominance in society and therefore relates tangentially to the subordination of women by men. Alternatively, they contend that Title VII should reach the subordination of men by men simply because it is subordination. *See* Brief of National Organization on Male Sexual Victimization, Inc., et al. as Amici Curiae in Support of Petitioner ("NOMSV Br.") at 7-11. At best, such arguments merely maintain that male harassers harass because *they* are male, which does not mean their behavior was caused by the gender of their victims pursuant to Title VII. At worst, these arguments suggest that the purpose of Title VII is to deconstruct and reshape some collective male psyche. *See What's Wrong*, at 768 ("Title VII should not be the vehicle by which we dismantle every hypermasculine or hyperfeminine microculture.").

majority had imported a cause of action for sexual orientation discrimination into Title VII.

3. The EEOC also recognizes that sexual content alone is not enough.

As the Eleventh Circuit made clear in *Henson*, the EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11, about which there is much discussion in the briefs filed in this case, do not pretend to provide a comprehensive explanation of the elements a plaintiff must prove to prevail on a sexual harassment claim. They define only part of the plaintiff's prima facie case. *See What's Wrong*, at 719 (observing that the EEOC Guidelines on gender-based harassment interpret only two of the five elements of the plaintiff's prima facie case as outlined in *Henson*).

The EEOC Compliance Manual, which fills in these gaps in the Guidelines, makes clear that, true to the statutory language, opposite gender sexual harassment for Title VII still requires proof of discrimination "because of gender." *See* EEOC COMPLIANCE MANUAL (CCH) § 615.2(b)(3) (1987) (observing that, even in same-gender sexual harassment cases, "the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex"); *id.* § 615.3(a) ("Sexual harassment is sex discrimination not because of the sexual nature of the conduct to which the victim is subjected but because the harasser treats a member or members of one sex differently from members of the opposite sex."); *id.* § 615.6(a) ("[S]ome forms of verbal conduct (such as specific words or some jokes) may

involve sex or sexuality without discriminating on the basis of sex. That is, such conduct does not treat one sex more or less favorably than the other sex. Without such disparate treatment, unwelcome verbal conduct of a sexual nature is not sex discrimination and consequently, cannot be sexual harassment [prohibited by Title VII]."). Thus, the EEOC, like the courts, recognizes that discrimination "because of gender" is a necessary element of a Title VII sexual harassment claim.

4. The conduct complained of here has only sexual content and nothing to suggest discrimination because of gender.

Oncale's factual allegations state a case of male-on-male sexually charged hazing in the workplace. Unlike the sexually charged hazing in *Quick* and *Goluszek*, the conduct in this case occurred in an all-male environment, precluding any comparative evidence that could prove discrimination because of gender. Thus, as in *Quick* and *Goluszek* – and every other case of sexually charged male hazing, horseplay, or ritual – the sexual content alone does not raise an inference that the conduct occurred because of the victim's sex.

The Fifth Circuit previously refused to allow a Title VII harassment claim when faced with similar allegations of male hazing behavior on an offshore oil rig. In *Vaughn v. Pool Offshore Co.*, 683 F.2d 922 (5th Cir. 1982), Vaughn, an offshore oil rig roustabout, claimed hostile environment racial harassment under Title VII and 42 U.S.C. § 1981. About a month after Vaughn began working he was:

> subjected . . . to a practice known as "doping" or "hazing." He was seized by other Pool employees, stripped, and had his genitals covered with grease. Vaughn [also] suffered the indignities of being doused with cold water or ammonia while showering, having the lights cut off while bathing, and having hot coffee poured in his back pocket.

Id. at 923. Vaughn's co-workers used racial slurs, including remarks that the district court found could not be regarded as harmless. *Id.* at 924. Vaughn claimed the racially charged atmosphere compelled him to quit his job. *Id.* at 923.

The Fifth Circuit affirmed the district court's summary judgment in favor of the employer on Vaughn's Title VII claim. *Id.* The court noted that Vaughn was employed as a roustabout, and that, on an off-shore oil platform, "[r]oustabouts occupied the lowest rung on the Rig's employment ladder." *Id.* The court also observed that during a crew's seven days on duty, "they lived and worked together within the restricted confines of the offshore platform. Life in these close quarters was, by all accounts, rowdy and rough. Raw pranks, crude practical jokes and verbal abuse abounded, some of it permeated with racial overtones." *Id.* As to the genital assault on Vaughn, the court stated in a footnote:

> It would appear that this treatment was frequently accorded, as a seeming rite of passage, to new offshore rig workers. The white toolpusher was "doped" twice. Others confirmed the same experience. Color played no part in

> selection of the subjects of this oil patch pastime.

Id. at 923 n.1.

In deciding the Title VII issue, the Fifth Circuit stated that "[t]he question in this case is whether the harassment Vaughn experienced resulted from an environment 'polluted with discrimination' or from an atmosphere replete with instances of humiliating acts shared by all. *Id.* at 924 (quoting *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)). "The district court held the summary judgment evidence showed only the latter, concluding that the hazing and practical joking should be viewed realistically as male interaction and not atypical of the work environment involved." *Id.* Finding that ample evidence supported the conclusion that nearly all the rig employees were victims of the pranks at one time or another, and that Vaughn did not believe his treatment was racially motivated, the Fifth Circuit affirmed the district court's summary judgment. *Id.* at 925.

In *Vaughn*, the plaintiff's hazing was accompanied by racially offensive slurs but the plaintiff recognized and the Fifth Circuit determined that no Title VII racial discrimination had occurred. *Id.* Like the plaintiff in *Vaughn*, Oncale, according to his own allegations, was the victim, along with other co-workers, of male hazing in an all-male environment.[14] While the conduct, if it occurred as

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[14] Because Oncale has not produced evidence raising a fact issue that the alleged harassment occurred because of gender, his Title VII sexual harassment claim fails as a matter of law

alleged, presumably violated Louisiana state tort law, it is not actionable under Title VII as discriminatory sexual harassment. Similarly, there is no evidence here of discrimination because of gender. The sexual content of the conduct here does not raise an inference of discrimination because of gender, and that is all that Oncale can point to in his effort to reverse the trial court's summary judgment.

Thus, the Fifth Circuit correctly disposed of Oncale's sexual harassment claim as a matter of law for several reasons. First, Oncale's allegations state merely a claim of male-on-male harassment with sexual overtones in an all-male environment. *See Giddens v. Shell Oil*, No. 92-8533, slip op. at 2 (5th Cir. Dec. 6, 1993) ("male-on-male sexual harassment with sexual overtones is not sex discrimination without a showing that an employer treated the plaintiff differently because of his sex"). Second, Oncale's allegations fail to raise a fact issue as to the existence of anti-male bias. *See Garcia v. Elf Atochem North Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994) (citing *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988)). Finally, to the extent the Fifth Circuit has adopted a per se rule precluding all same-

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regardless of whether it is analyzed as a hostile environment case or a quid pro quo case. Furthermore, although Oncale suggests that his allegations might state a case of quid pro quo harassment, the summary judgment record is devoid of any evidence that Oncale's alleged harassers attempted to "extort sexual consideration" from him or "condition employment benefits on sexual favors" from him. Because there is no fact issue under this additional element of a quid pro quo claim, Oncale's suggestion that he states such a claim fails for that reason as well. *See Jones v. Flagship Int'l*, 793 F.2d 714, 722 (1986).

gender sexual harassment cases under Title VII, the court correctly refused to convert Title VII into a generalized workplace behavior statute. *See Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730, 737 (N.D. Ill. 1996).

B. Same-Gender Sexual Harassment Has Only Sexual Content and Nothing to Suggest Discrimination Because of Gender.

Courts allowing same-gender sexual harassment actions to survive summary judgment do convert Title VII when they literally comply with the statutory language by relying on purported showings of discrimination because of gender. The courts' inquiries devolve into discrete categories: harasser's homosexual orientation, gender stereotyping, and comparative evidence in workplace misconduct cases involving a dual-gender working environment. *See, e.g., Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1505 (11th Cir. 1997) (male harasser who only sexually harassed men due to homosexual orientation), *petition for cert. filed*, 66 U.S.L.W. 3170 (Aug. 20, 1997); *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 448 (6th Cir. 1997) (same); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (same); *Doe v. City of Belleville*, 119 F.3d 563, 575-77 (7th Cir. 1997) (considering taunts directed at boy with earring as gender stereotyping); *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1379 (8th Cir. 1996) (comparative evidence showing men treated worse than women at workplace by virtue of men being grabbed or poked in the testicles by other men, i.e., "bagged"); *see also Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805, 808 (N.D. Ind. 1995) (allowing same-gender action to survive 12(b)(6) motion based on theoretical

possibility of proving gender-biased atmosphere). These categories track the literal language of the statute, but do not bring along with that statutory language its meaning derived from the purpose of Title VII. The categories inevitably fail to prove discrimination because of gender under Title VII. Rather, these categories ultimately reveal that same-gender sexual harassment is mere workplace misconduct and/or sexual orientation discrimination.

1. Same-gender sexual harassment is mere workplace misconduct with sexual overtones.

If the cases filed to date in the federal courts are any indication, much of same-gender sexual harassment occurs, as it did here and in *Vaughn*, between males. Male heterosexuals might harass each other with sexually-charged conduct for any number of reasons unrelated to what the lower courts have considered "because of [the harassee's] gender." *See Doe*, 119 F.3d at 604 (Manion, J., concurring in part and dissenting in part) ("The difficulty of proving discrimination because of the person's sex stems from the reality that when a man harasses another man it is very unlikely that he is doing so because the victim is a man.").

As amici point out: "Men sexually abuse . . . men, typically on the basis of their status as men of a particular age; physical stature; ethnicity; race; disability . . . that makes them attractive for, or vulnerable to, male sexual aggression." NOMSV Br. at 9-10 (record citations and cases omitted); *see also What's Wrong*, at 697-98 (In such cases, "[r]ather than sexually objectifying the plaintiff, the harasser engages in sexual behavior that is designed

to or has the effect of making the plaintiff annoyed, uncomfortable, offended, humiliated, intimidated, or otherwise victimized by the [harasser's] conduct.").

Male heterosexuals' sexually harassing conduct towards other males could be hazing or some other type of male ritual behavior. *See, e.g., Seamons v. Snow*, 84 F.3d 1226, 1230 (10th Cir. 1996) (sexual assault of high school football player by five of his upper-class teammates while other teammates looked on); *Skinner v. City of Miami*, 62 F.3d 344, 346-47 (11th Cir. 1995) (plaintiff firefighter sustained injuries when fellow firefighters engaged in alleged "horseplay and hazing" involving sexual assault), *cert. denied*, 117 S. Ct. 1425 (1997)[15]; *Quick*, 90 F.3d at 1374 ("bagging").

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[15] Documented reports can be found concerning sexual content male hazing in a number of settings, including the military, see Kingshott, *Military Harassment Costs Could Hit $1 Billion A Year*, San Antonio Exp. News, Feb. 13, 1997 (Male-on-male sexual harassment takes "the form of hazing during training. 'A lot of this is going on in the military,' Farley said, 'and a lot of this is sexual in nature with heterosexuals harassing other heterosexuals during non-duty hours. It's a power thing. . . . You're the new person and you have to go though this because we did."); the high school football locker room, see *McAteer Principal Gets Some Support*, S.F. Chron., Feb. 10, 1988, 1988 WL 6106192 (high school principal suspended for handling of hazing incident during which a football team member was pinned on the locker room floor and poked from behind with a broomstick and later needed stitches to close his lacerated scrotum); and college fraternities, see *Hope College Fraternity Caught For Alleged Hazing*, Fraternity Newsletter, June 1988, at 8 (pledges required to wear only jock straps and were burned lightly with matches); *Hazing Had Parallel Among Primitive People*, Sci. Digest, Jan. 1961 at 23 (initiates forced to spray paint

Equating Title VII's inclusion of "sex" with "sexual" contravenes the language and purpose of the statute and only confuses the issues.[16] Noting that with same-gender harassment "the distinction becomes very important," the court in *Vandeventer v. Wabash National Corp.*, 887 F. Supp. 1178 (N.D. Ind. 1995), aptly stated:

> [t]he words 'sex' and 'sexual' create definitional problems because they can mean either 'relating to gender' or 'relating to sexual/reproductive behavior.' The two are not the same, but are certainly related and easily confused. Title VII only recognizes harassment *based* on the first meaning, although that frequently *involves* the second meaning. However, harassment which involves sexual behavior or has sexual behavior overtones (i.e., remarks, touching, display of pornographic pictures) *but is not based on* gender bias does *not* state a claim under Title VII.

Id. at 1181 (emphasis in original); *see also Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 749 n.1 (4th Cir. 1996) ("Indeed, the use of 'sex' and 'gender' interchangeably [in Title VII cases] may impose a useful limit

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their bodies and walk publicly in clothing of opposite sex); *The Netherlands: Night of the Pig*, TIME, Nov. 9, 1962 at 35 (initiates crammed naked into room with over 230 other underclassmen and drenched with beer while upperclassmen walked on their heads), *cited in* Darryll M. Halcomb Lewis, *The Criminalization of Fraternity, Non-Fraternity and Non-Collegiate Hazing*, 61 MISS. L.J. 111, 116 n.23 (1991) (discussing "the reality that hazing is a common occurrence in all segments of American life").

[16] In *Meritor*, the Court interpreted the meaning of Title VII's prohibition of discrimination in the "terms, conditions, or privileges" of employment; *Meritor* did not, however, expand the meaning of "sex." *See* 477 U.S. at 65-66.

on the term 'sex,' which otherwise might be interpreted to include sexual behavior."), *cert. denied*, 117 S. Ct. 70 (1996); *Doe v. City of Belleville*, 119 F.3d 563, 604 (7th Cir. 1997) (Manion, J., concurring in part and dissenting in part) (describing the difference between " 'sex,' as used in the statute to mean a biological fact, and 'sexuality,' as used by the court to mean sexual overtones, sexual content, sexual character, and so on.").

2. Same-gender sexual harassment is discrimination because of sexual orientation.

Alternatively, same-gender sexual harassment may be a product of one or the other party's homosexual orientation. Courts inevitably merge gender and sexual orientation when they conclude that a "homosexual harasser" can sexually harass a person of the same gender in violation of Title VII. Inquiring into the sexual orientation of an alleged harasser as a means of raising a fact issue of discrimination because of gender necessarily conflates gender and sexual orientation.

For the same reasons that Title VII does not redress discrimination because of sexual orientation, the homosexual orientation of either or both individuals in a same-gender sexual harassment case does not raise an inference of "because of gender" discrimination. *See Miller v. Vesta, Inc.*, 946 F. Supp. 697 (E.D. Wis. 1996) (declining to consider the alleged harasser's homosexuality in determining whether plaintiff raised a fact issue on her hostile environment claim because plaintiff's heterosexuality, as

a sexual orientation, is not a protected characteristic under Title VII).[17]

The conflicting results in same-gender sexual harassment cases involving so-called "homosexual harassers" and "heterosexual harassers" reveal an incoherency that derives from this confusion of sexual orientation with gender. *Compare Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996) (Title VII sexual harassment claim survived dismissal based on allegations that homosexual male employees pressured heterosexual male employees to engage in homosexual sex and subjected them to numerous graphic and sexually explicit remarks containing descriptions of homosexual sex, as well as sexually provocative physical contact), *with Carreno v. IBEW Local No. 226*, 1990 WL 159199 (D. Kan. 1990) (homosexual man who was subjected by his heterosexual male co-workers to epithets such as "Mary" and "faggot," and having his genitals and buttocks caressed, did not plead a prima facie case of sexual harassment under Title VII because harassment was not because of his gender, even though plaintiff expressly stated he was not asserting a claim of sexual orientation discrimination), *and Dillon v. Frank*,

[17] Symmetry is achieved *and* the purpose of Title VII is satisfied by the recognition of female-on-male sexual harassment claims. Moreover, any contention that heterosexuals may be disproportionately affected by a refusal to redress same-gender sexual harassment claims does not suggest a different result under Title VII. *See DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (dismissing disparate impact claim based on allegations that discrimination against homosexuals disproportionately affects men).

1992 WL 5436 (6th Cir. 1992) (homosexual plaintiff's allegations of sexual harassment by heterosexual male co-workers, including taunts of "fag," "Dillon sucks dick," and physical assaults, were not because plaintiff was male, but rather because he was homosexual). Regardless whether the harasser or the victim is homosexual, Title VII does not extend to same-gender sexual harassment.

Courts likewise meld gender discrimination and discrimination because of sexual orientation when they conclude that gender stereotyping in the context of same-gender harassment amounts to discriminatory sexual harassment in violation of Title VII. Courts and amici in this case have misconstrued the Court's decision in *Price Waterhouse* as supporting the notion that gender stereotyping is *per se* gender discrimination. *See Doe v. City of Belleville*, 119 F.3d 563, 580-82 (7th Cir. 1997).[18] As the Court explained in *Price Waterhouse*, "[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision." 490 U.S. at 251; *see also Doe*, 119 F.3d at 607 (Manion, J., concurring in part and dissenting in part) (disagreeing with the panel majority's broad reading of *Price Waterhouse*); *Dillon*, No. 90-2290, 1992 WL 5436, at *9-10 (distinguishing *Price Waterhouse* and refusing to apply Title VII to same-gender sexual harassment claim based on gender-stereotyping comments).

[18] *See also* Lambda Br. at 8-9; Law Prof Br. at 3, 16-17; NOMSV Br. at 10.

The use of gender-stereotyping remarks would swallow whole the oft-rejected congressional proposal to prohibit sexual orientation discrimination under Title VII. *See* S. 869, 143 CONG. REC. S5458 (daily ed. June 10, 1997) (proposed legislation (ENDA) to redress discrimination in employment because of real *or perceived* sexual orientation). Consequently, such gender stereotyping comments should not yield a fact issue on whether the harassment was because of gender.

CONCLUSION

Oncale's allegations do not support the conclusion that he was subjected to discrimination because he is a man as required for actionable sex discrimination under Title VII. While male-on-male hazing in an all-male environment presumably states a claim under any number of state law theories or statutes, it does not state a claim under Title VII. In recognizing opposite-gender sexual harassment as a form of sex discrimination, the Court did not create a stand-alone cause of action for unwelcome sexuality in the workplace. To allow Oncale's claim to survive summary judgment would require the Court to hold that the sexual content alone of harassing conduct raises an inference of discrimination because of gender. Such a holding would read the words "because of sex" out of the statute, unmoor sexual discrimination under Title VII from the statute's principle and purpose, and convert Title VII into a workplace tort statute.

For these reasons, the Court should affirm summary judgment in this case and hold that Oncale's claim is not cognizable under Title VII.

Respectfully submitted,

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